93-948
NO.

Supreme Court, U.S.
FILED
DEC 13 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

HENRY CHIMEZIE OKPALA,

Petitioner,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

Petition for a Writ of Certiorari
To the United States Court of
Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the interpretation of 8 U.S.C. §1182(c) given by the United States Court of Appeals for the Fourth Circuit is consistent with the plain language and legislative history of the statute?

LIST OF PARTIES

The only parties to this proceeding are named in the caption: Henry Chimezie Okpala as Petitioner, and the United States Immigration and Naturalization Service as Respondent.

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Opinion of the United States Court of Appeals for the Fourth Circuit, (No. 92-1963) (September 13, 1993) (unpublished, *per curiam*) *(App. 17)*

JURISDICTIONAL STATEMENT

The Attorney General, through the Immigration and Naturalization Service, and the Department of Justice, has exclusive authority for the administration and enforcement of the Immigration and Nationality Act under 8 U.S.C. §1103(a).

Jurisdiction of the Office of the Immigration Judge, Executive Office for Immigration Review, U.S. Department of Justice, over the initial deportation proceeding in this case was conferred by 8 U.S.C. §1252(b), 8 C.F.R. §3.10, and 8 C.F.R. §242.8.

The Board of Immigration Appeals, Executive Office for Immigration Review, had jurisdiction of Petitioner's appeal from the decision of the Immigration Judge under 8 C.F.R.

§3.1(b)(2).

The Court of Appeals had jurisdiction of Petitioner's appeal from the decision of the Board of Immigration Appeals under 8 U.S.C. §1105a(a), which vests the Courts of Appeals with jurisdiction of all appeals from final orders of deportation.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE

Section 1182(c) of the Immigration and Nationality Act. The full text of this statute is set forth in the Appendix at page App. 24.

STATEMENT OF THE CASE

Petitioner, pursuant to an Order to Show Cause served upon him, appeared before an Immigration Judge on January 2, 1992. At that time, Petitioner applied for relief from deportation under 8 U.S.C. §1182(c) of the Immigration and Nationality Act.[1] The Immigration Judge did not permit the reception of evidence relevant to this waiver, the Court there ruling that this was

[1]Petitioner also applied for relief from deportation under 8 U.S.C. §1255(a) [adjustment of status], a hardship waiver under 8 U.S.C. §1182(h), and political asylum, 8 U.S.C. §1158. Petitioner withdrew his application for political asylum before the trial of this matter. Further, adjustment of status was denied, but this denial is not the subject of this petition.

precluded by both Board of Immigration Appeals (BIA) and Fourth Circuit precedents.

The Immigration Court issued its written Memorandum of Decision on February 11, 1992. All applications for relief were denied.

On or about February 23, 1992, Petitioner filed an appeal to the Board of Immigration Appeals. On June 24, 1992, the BIA issued its decision. The BIA denied Petitioner's application for relief under 8 U.S.C. §1182(c), the Board there refusing to reconsider its interpretation of the statute.

On August 18, 1992, Petitioner filed a Petition for Review in the United States Court of Appeals for the Fourth Circuit. That Court, on September 13, 1993, issued an opinion whereby it ruled that it would not revisit its previous decisions interpreting this statute. Petitioner now seeks a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit for review of that Court's decision.

STATEMENT OF FACTS

Petitioner first entered the United States as a nonimmigrant student on January 10, 1982.[2] Petitioner later married an

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[2] 8 U.S.C. §1101(a)(15)(F)(i).

American citizen, and applied to adjust his status[3] to permanent resident on the basis of this marriage. Thereupon, on October 12, 1988, Petitioner was granted Conditional Lawful Permanent Resident Status.[4]

On April 3, 1989, Petitioner was convicted in the United States District Court for the District of Maryland for false representation of a social security number. In addition, on March 28, 1990, Petitioner Okpala was convicted in the United States District Court for the Western District of North Carolina of bank fraud, aiding and abetting the same, and conspiring to commit that offense.

On October 16, 1990, Okpala and his wife filed a petition with the INS requesting removal of the conditional basis of his residence. That petition was approved on November 20, 1990.

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[3]8 U.S.C. §1255(a).

[4]8 U.S.C. §1186a. Petitioner and his American citizen wife were married on December 18, 1987. At the time of Petitioner's application for adjustment of status, he was married less than 24 months to his spouse. As such, Petitioner's application fell under the provisions of 8 U.S.C. §1186a, whereby he was granted Conditional Permanent Resident Status for a period of two years. This section requires the alien and his spouse to file a petition, no later than 90 days before the second anniversary of the alien's obtaining the status of lawful permanent residence, requesting the Immigration and Naturalization Service to remove the Conditional Status. 8 U.S.C. §1186a(d)(2)(A).

In sum, Okpala had established a domicile in the United States for nearly nine years at the time deportation proceedings were instituted in this case.

REASONS FOR GRANTING THE WRIT

This is a case which considers the question of whether and to what degree an agency's interpretation of a statute must be given effect when that interpretation is in conflict with the plain language of the statute and the congressional intent expressed in the statute.

CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE COURT BELOW AND TO RESOLVE A CONFLICT OF INTERPRETATION IN THE COURTS OF APPEALS REGARDING THE CONSTRUCTION OF 8 U.S.C. §1182(c).

A conflict exists in the Courts of Appeals regarding the construction of 8 U.S.C. §1182(c). The standard applied in the Fourth Circuit, set forth in the case of *Chiravacharadhikul v. I.N.S.*, 645 F.2d 248 (4th Cir. 1981), requires, as a prerequisite, seven years of a lawful, unrelinquished domicile after a grant of lawful permanent resident status. That case followed and adopted the holding of *Castillo-Felix v. I.N.S.*, 601 F.2d 459 (9th Cir. 1979). This line of cases is also consistent with the interpretation of §1182(c) given by the BIA in *Matter of S*, 5 I &

N Dec. 116 (1953), *Matter of Anwo,* 16 I & N Dec. (1977), and *Matter of Newton,* 17 I & N Dec. 133 (1979).

A contrary view is held in the Second Circuit. Under the holding of *Lok v. I.N.S.*, 548 F.2d 37 (2nd Cir. 1977), relief under §1182(c) is available if the alien can establish seven years of lawful, unrelinquished domicile, regardless of whether all or part of that period was spent while enjoying the status of a lawful permanent resident.

An examination of these precedents compels the conclusion that the holding of *Lok* is more consistent with the plain language and legislative history of the statute.

1. **The *Lok* case.**

In *Lok v. I.N.S.*, 548 F.2d 37 (2nd Cir. 1977), the alien committed a deportable narcotics offense after the grant of permanent resident status. Prior to the grant of permanent resident status, however, the alien had maintained a domicile in the United States of more than seven years.

The Court in *Lok* was confronted with the interpretation of §1182(c) given by the BIA in *Matter of S,* 5 I & N Dec. 116 (1953), or following a more literal interpretation of the statute. While recognizing that deference is normally due to an agency's

interpretation of statute committed to its responsibility, the Court nevertheless chose to follow a different interpretation. The Court first reasoned that the term "lawfully admitted to permanent residence" is specifically defined in the Act[5], and that this definition is not the same as the terms "lawful unrelinquished domicile". Therefore, the Court reasoned, a plain reading of the statute would suggest that the permanent resident need only be returning to a lawful unrelinquished domicile of seven years. Next, the Court examined the legislative history of the section. Both in 1950 and in 1952, the Congress considered the inclusion of language which would have expressly mandated the result and holding of *Matter of S,* 5 I & N Dec. 116 (1953), but rejected it, leaving the section as it exists today. The Second Circuit, noting that Congress had made a distinct policy choice, declined to follow the BIA construction of the statute in favor of a more literal reading based on the language of the section and a fair

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[5]**§1101. Definitions.**

(a) As used in this chapter--

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

reading of the pertinent legislative history.

2. The *Castillo-Felix* case.

In *Castillo-Felix v. I.N.S.*, 601 F.2d 459 (9th Cir. 1979), a deportable alien applied for relief under §1182(c) after residing in the United States as a lawful permanent resident for five years. He had established a domicile in the United States, with some absences, for a period of fourteen years previous to his application for relief.

The Court here was faced with the choice of either following the line of BIA interpretations of §1182(c) beginning with *Matter of S.* 5 I & N Dec. 116 (1953), or following the rationale of the only federal appellate opinion on point at that time, *Lok v. I.N.S.*, 548 F.2d 37 (2nd Cir. 1977). The Ninth Circuit chose to follow the former.

While conceding that the section is somewhat ambiguous, the Court proceeded to accord greater deference to the agency's interpretation than was given by the Second Circuit. Further, the Court felt that this additional degree of deference was justified, agreeing with the agency that the interpretation given by the Second Circuit and urged by the alien there would serve to undermine other provisions of the law granting

discretionary relief from deportation, such as 8 U.S.C. §1254(a) [suspension of deportation].[6] For these reasons, the Court concluded that for an alien to be eligible for relief from deportation under §1182(c), the alien must accumulate seven years of lawful permanent domicile after admission as a lawful

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[6]**§1254. Suspension of deportation.**

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and--

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraph (2), (3) or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

permanent resident.

3. The *Chiravacharadhikul* case.

The Fourth Circuit was the next federal appellate court to consider the two views of §1182(c). In *Chiravacharadhikul v. I.N.S.*, 645 F.2d 248 (4th Cir. 1981), the alien committed a deportable offense one year after his admission as a lawful permanent resident, and deportation proceedings were instituted. The alien applied for relief under §1182(c), but was denied this relief, the Immigration Judge finding that the alien had not accumulated seven years of lawful unrelinquished domicile after his admission as a lawful permanent resident. Prior to this application for relief, the alien had been residing in the United States for nearly ten years.

The Court was faced with a conflict in the circuits regarding the proper interpretation of the provision, and after reviewing the law, chose to follow the holding in *Castillo-Felix v. I.N.S.*, 601 F.2d 459 (9th Cir. 1979). The Fourth Circuit deferred to the agency interpretation of the provision, as did the Court in *Castillo-Felix*, finding no conflict between the agency interpretation of the provision and the legislative history of the statute. Further, that Court was persuaded by the fact that

Congress had in effect acceded to the agency interpretation for over twenty six years, the Court reasoning that Congress would not permit the BIA interpretation to stand if it frustrated its legislative intent. Thus, the Fourth Circuit concluded that for an alien to be eligible for relief under §1182(c), the alien must establish seven years of lawful unrelinquished domicile after his admission as a lawful permanent resident.

4. The *Lok* interpretation of §1182(c) is more consistent with the plain language and legislative intent of the statute.

Unless a contrary legislative intent can be shown, the plain language of a statute is controlling when a court seeks to interpret its meaning. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1988). Reading the first two clauses of §1182(c) in logical succession, the alien must show (1) that he is a lawful permanent resident, and (2) that he is returning to a lawful unrelinquished domicile of seven consecutive years. This literal reading leads to the conclusion that the Attorney General may exercise his discretion to admit the alien, without regard to whether the alien has spent the statutory seven year period entirely as a lawful permanent resident.

The ambiguity arises, however, when both clauses are

read together. It is fair to say that an objective reading of the statute leads to the conclusion that the seven years of lawful unrelinquished domicile must have been spent as a permanent resident. Conceding, for the sake of argument, therefore, that this section is ambiguous, the next step in the analysis is a review of the legislative history of the section.

The present provision replaced the 7th Proviso to §3 of the Immigration Act of 1917.[7] The Immigration and Nationality Act of 1952 modified this section to add the requirements of lawful permanent residence and a return to a lawful domicile. This had the effect of restricting the availability of the section to a certain class of aliens.

Prior to the 1952 enactment, the Congress, in 1950, considered inserting the words "established after a lawful entry for permanent residence" into the 7th Proviso, but explicitly declined to do so, recommending instead that the proviso be limited to aliens who have the status of lawful permanent residents who are returning to a lawful domicile of seven

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[7] *Provided further*, [7] That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.

Act of Feb. 5, 1917, ch. 29, §3, 39 Stat. 878.

consecutive years after a temporary absence abroad. S. Rep. No. 1515, 81st Cong., 2nd Sess., 384 (1950). *See Lok v. I.N.S.*, 548 F.2d 37, 40 (2nd Cir. 1977).

In 1952, the Congress which enacted the present provision again considered more restrictive language, and again rejected the restrictive language in favor of the present text. The only restrictive language adopted was the requirement that the alien be (1) lawfully admitted to permanent residence, and (2) that the alien be returning to a lawful unrelinquished domicile of seven consecutive years. *See Lok v. I.N.S.*, 548 F.2d 37, 40-41 (2nd Cir. 1977); H.R. Rep. No. 1365, 82nd Cong., 2nd Sess., 51 (1952), *reprinted at* 1952 U.S. Code Cong. 7 Admin. News 1653, 1705 (1952). This reading of the legislative history supports the reading urged by Petitioner in the present case. Further, this reading of the legislative history overcomes any ambiguity which may arise in attempting to derive the plain meaning of the statute. It is evident that if Congress intended §1182(c) to require seven years of lawful unrelinquished domicile after admission to permanent residence, it would have done so, as it has with other provisions of the Act when a set period of permanent residence is required. *See* 8 U.S.C.

§1427(a) (five years of continuous residency as permanent resident required for naturalization); 8 U.S.C. §1430(a) (three years of continuous residency as permanent resident required of spouses seeking naturalization through U.S. citizen spouse).

Two arguments, however, have been advanced by the Courts applying the BIA interpretation to support the seven year permanent resident requirement: (1) that deference should be accorded to the agency interpretation, particularly when that interpretation has defined the existing practice for a long period of time, and (2) that a literal reading of the section would impair the effective administration of the Immigration and Nationality Act as a whole.

As a general proposition, it is true that a certain degree of deference is due to the agency responsible for the administration of an Act of Congress. *Udall v. Tallman*, 380 U.S. 1 (1965). However, this principle has never been applied when an agency's interpretation of a statute is inconsistent with the statutory mandate, frustrates a congressional policy underlying the statute, or conflicts with the plain language of the statute. *N.L.R.B. v. Brown*, 380 U.S. 278, 290-292 (1965). As this Court stated in *Chevron, U.S.A., Inc. v. Natural Resources*

Council, Inc., 467 U.S. 837 (1984), "[w]hen a court reviews an agency's interpretation of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." In the present case, the Congressional intent is clear from a plain reading of the statute and an examination of the legislative history. Therefore, there is little left for a court, or the agency, to do, other than to give full effect to the express Congressional intent. *See Chevron*, 467 U.S. 843, n.9.

Perhaps a greater degree of deference should be given when there is no legislative history to support either interpretation of a given provision. As this Court further observed in *Chevron*, "[i]f, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the

court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842-843. In the present case, extensive legislative history is available to determine the congressional intent, and it shows, without question, that the agency interpretation is fully at odds with the congressional intent.[8] Thus there is no need for a court to accord the degree of deference suggested by *Chevron* to the statute here. Judicial deference in this case, as applied in *Chiravacharadhikul* and *Castillo-Felix*, is contrary to the explicit intent of Congress, permitting an unjustified, unreasonable executive intrusion into the province of the legislature, the very arena where the Constitution places the responsibility for these policy choices.

A greater degree of deference may also be due where the statute is ambiguous. Assuming, as the Court in *Castillo-Felix* did, that §1182(c) is ambiguous, this ambiguity should be resolved in favor of the alien. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Costello v. I.N.S.*, 376 U.S. 120, 128 (1964); *Lennon v. I.N.S.*, 527 F.2d 187, 193 (2nd Cir. 1975). Further, §1182(c), being a statute remedial in nature, suggest an

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[8]*See Castillo-Felix v. I.N.S.*, 601 F.2d 459, 468-469 (9th Cir. 1979) (Takasugi, J., dissenting); *Chiravacharadhikul v. I.N.S.*, 645 F.2d 248, 251-252 (4th Cir. 1981) (Haynsworth, C.J., dissenting).

interpretation in favor of the intended beneficiary.

Both the Fourth and Ninth Circuits expressed concern that adopting the *Lok* standard would impair the effective administration of the Immigration and Nationality Act. Both Courts agreed with the view of the BIA in *Matter of Anwo,* 16 I & N Dec. 293 (1977) that enforcement of 8 U.S.C. §1254(a) (suspension of deportation) would be weakened, since §1182(c), on its face, did not include the same qualitative standards set forth in §1254(a). The BIA in *Anwo* felt it appropriate to require stronger ties on the part of aliens seeking relief under §1182(c) by reading the provision to mean that an alien must have resided continuously in the United States for seven consecutive years as a permanent resident. The BIA, however, seemed to disregard the extensive review required of aliens applying for permanent residence, the intended beneficiaries of §1182(c), as opposed to the less stringent requirements of many included within the larger class of aliens entitled to apply for §1254(a) relief. Further, §1182(c) and §1254(a) were not intended to overlap, since §1182(c) was originally intended to apply to returning residents whose domicile was lawful. *See* Griffith, *Exclusion and Deportation--Waivers under Section*

212(c) and Section 244(a)(1) of the Immigration and Nationality Act, 32 DePaul L. Rev. 523, 536-537 (1983). *See also Castillo-Felix v. I.N.S.*, 601 F.2d 459, 469 (9th Cir. 1979) (Takasugi, J., dissenting).

CONCLUSION

The Court of Appeals gave undue deference to the agency's interpretation of 8 U.S.C. §1182(c), contrary to the plain language and explicit legislative intent of the provision. For these reasons, the Court of Appeals' ruling should be reversed and this Petition for Writ of Certiorari should be granted.

This 10th day of December, 1993.

RESPECTFULLY SUBMITTED,

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PETITIONER'S APPENDIX

PETITIONER'S APPENDIX
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C. Opinion of the United States Court of Appeals for the Fourth Circuit, (No. 92-1963) (September 13, 1993) (unpublished, *per curiam*) *App. 17*

D. 8 U.S.C. §1182(c) of the Immigration and Nationality Act *App. 24*

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND 21202

* * * * * * * *

IN THE MATTER OF	*	IN DEPORTATION
	*	PROCEEDINGS
	*	
HENRY CHIMEZIE OKPALA*		CASE #A 29 625 000
	*	
(RESPONDENT)	*	

* * * * * * * *

CHARGE: **§241(a)(2)(A(i) of the Immigration and Nationality Act,** conviction of a crime of moral turpitude within five (5) years of entry; **§241(a)(2)(A(i) of the Immigration and Nationality Act,** conviction of two (2) crimes of moral turpitude not arising out of a single scheme of misconduct.

APPLICATION: **212(c) of the Immigration and Nationality Act,** waiver of exclusion [deportation]; **§212(h) of the Immigration and Nationality Act,** waiver of inadmissibility and **§245(a) of the Immigration and Nationality Act,** adjustment of status;

§208 and 243(h) of the Immigration and Nationality Act, asylum and/or witholding of deportation; alternatively

§244(e) of the Immigration and Nationality Act, voluntary departure.

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MEMORANDUM OF DECISION AND ORDER

On January 2, 1992, the respondent appeared before the Immigration Court with counsel and presented his applications of relief from deportation. Specifically, at that hearing the respondent asked for a change of status to permanent resident based upon marriage to a United States citizen. See **§245(a) of the Immigration and Nationality Act** [hereinafter "INA"]. In conjunction with the adjustment of status application, the respondent requested a waiver of his inadmissibility for criminal misconduct under **§212(h) of INA.** Alternatively, the respondent requested voluntary departure in lieu of deportation under **§244(e) of INA.** Applications for asylum and witholding of deportation under **§208** and **§243(h) of INA** were dismissed for lack of prosecution [withdrawn by respondent] and an application for waiver of exclusion [deportation] under **§212(c) of INA** was dismissed on the record by the Court for lack of statutory eligibility. At the conclusion of the proceedings the Court reserved its decision in order to further review the

testimony and evidence of record.

BACKGROUND

The respondent who is a native and citizen of Nigeria entered the United States on May 14, 1988, in New York as a student. Subsequently, on October 12, 1988, in Baltimore, Maryland, the Immigration and Naturalization Service [hereinafter "INS"] granted the respondent conditional lawful permanent resident status based upon his marriage to a United States citizen. On April 13, 1989, the respondent was convicted in the United States District Court, District of Maryland, for false representation of a social security number and aiding and abetting in violation of **Title 42 U.S.C. §408(g)(2) and Title 18 U.S.C. §2.** The respondent was sentenced to imprison for "the time the defendant has served" and fined one thousand dollars ($1,000). Subsequently, on March 28, 1990, the respondent was convicted in the United States District Court, Western District of North Carolina, for conspiracy to commit an offense against the United States in violation of **Title 18 U.S.C. §371,** and for bank fraud and aiding and abetting in violation of **Title 18 U.S.C. §1344 and §2.** The respondent was sentenced to imprisonment for 27 months. On October 16, 1990, the respondent and his

United States citizen spouse filed a "Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status", form I-751, with the INS. The petition was approved by the INS on November 20, 1990.

On May 13, 1991, the INS, New Orleans, Louisiana, issued a show cause order against the respondent charging him as a alien subject to deportation for having been convicted of two (2) crimes involving moral turpitude not arising out of a single scheme of criminal misconduct as well as a conviction for a crime involving moral turpitude having been committed within five (5) years after entry into the United States. The deportation proceedings against the respondent commenced with the filing of the order to show cause before the Immigration Court, Oakdale, Louisiana, on May 28, 1991. The respondent subsequently appeared before the Immigration Court, Oakdale, Louisiana, on July 29, 1991, with former counsel wherein he admitted to all of the allegations[1] of fact contained in the order to show cause and

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[1]The respondent has admitted to allegation fourteen (14) in the order to show cause which represents the following:

"You and your spouse concealed the fact that you had been convicted of three felony violations subsequent to gaining Conditional Permanent Resident Status and prior to applying for the removal of the "Conditional Status" by indicating on the Form I-751 that your address was 5803 Leith Walk, Baltimore, Maryland, when

the charges of deportability. There is no dispute that the respondent is subject to deportation as charged. Respondent subsequently secured a change of venue from the jurisdiction of Oakdale, Louisiana, to the Immigration Court in Baltimore, Maryland. A status hearing was conducted on September 25, 1991, in order for the Court to be satisfied that the respondent had relocated to its jurisdiction and continued to seek relief from deportation.[2]

In a memorandum to the Court dated November 25, 1991, wherein the respondent filed his applications for relief from deportation to include §212(c), 212(h) waivers, and a request for an adjustment of status under 245 of INA, the respondent withdrew his request for asylum in the United States. Thus, the applications for asylum and witholding of deportation have been dismissed for lack of prosecution by the Court on the record at the proceedings of January 2, 1992. In addition as

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in fact, your address was Federal Prison Camp, Allenwood, Pennsylvania".

Notwithstanding the admission of this allegation, there exists no charge of deportability under 216 of INA relating to the allegation.

[2]Of course it should be noted that respondent's present counsel of record was not counsel of record during the pleading proceedings in Louisiana.

discussed below under the **FINDINGS OF THE COURT** an application for a waiver under **§212(c) of the INA** has been denied as well.

POSITION OF THE PARTIES

1. **The Respondent**

In support of his petitions for relief from deportation, the respondent has filed the following evidence:

Respondent Exhibit #1 - Application for Waiver of Deportation [Form I-191] under **§212(c) of the INA**

Respondent Exhibit #2 - Copy of Petition for Alien Relative [Form I-130] filed by Sheila C. Okpala, spouse of the respondent and a United States citizen with noted approval date of October 12, 1988.

Respondent Exhibit #3 - Application for Waiver of Ground of Excludability [Form I-601], **§212(h)** hardship waiver.

Respondent Exhibit #4 - Application for Permanent Residence for respondent [Form I-485].

In addition, the respondent has presented his testimony and the testimony of his United States citizen spouse Sheila Okpala. Briefly, the respondent's spouse Sheila Okpala testified that she and the respondent were married on December 18, 1987.

The witness testified that while there were no children born of this marriage, she does have a son age fourteen (14) who resides with the family. The witness testified that her husband has a good relationship with her son Sean. The witness testified that the respondent contributes to their household and it would be hardship to her and her son if the respondent was forced to leave the United States. She noted that while the respondent was incarcerated she had to sell one of the family cars and there was an economic hardship to the family. The witness testified that she needs her husband (economically) and that she would prefer not to go to Nigeria. She noted further that she wanted to be with her husband although it would cause problems with her son to uproot him and attempt to take him to Nigeria.

The respondent testified that he is presently working in the United States, is married to Sheila Okpala and is stepfather to Sean Blackwell. He noted that in 1988 he visited Nigeria but last lived in Nigeria in January of 1982. The respondent testified that he holds and undergraduate degree from Morgan State University and has been working on his master's degree in international management. He noted further that in 1987 both he and his spouse purchased a home and that the family would

suffer hardship if he is not permitted to live in this country. He testified that his stepson has asthma and it would be difficult for him to get treatment in the country of Nigeria.

Under cross-examination there was some "vague" testimony as to the disagreement and separation between the respondent and his spouse sometime in 1988. Cross-examination however focused on the arrest and subsequent conviction of the respondent where he was found guilty of bank fraud, aiding and abetting, and conspiracy to commit an offense against the United States, to wit, using a false social security card. Under cross-examination, the respondent was not clear as to the filing of income tax returns although he indicated that he and his wife have filed jointly.

In response to the Court's inquiry, the respondent testified that he served twenty-seven (27) months in prison and was convicted by a jury. He further noted that an appeal was filed and subsequently denied.

The respondent asks that the Court grant a hardship waiver under **§212(h) of INA,** in order to waive the present ground of inadmissibility. Further, he asks that the Court grant his application for adjustment of status to permanent residence

based upon this marriage both as a matter of law and as a matter of discretion.

2. **The INS**

The INS opposes the applications for relief from deportation. They note that the respondent's case does not satisfy the statutory eligibility for a **§212(h)** waiver in order to render him further statutorially eligible for adjustment of status. Further, they note that the respondent's past criminal misconduct in the United States is not deserving of a favorable exercise of discretion. They ask the Immigration Court to deny all applications for relief of deportation and order the respondent deported.

STATUTE, REGULATIONS AND CASE LAW

[Portions of the Court's Memorandum reviewing the law regarding adjustment of status and §212(h) waiver have been omitted here, since this petition is not requesting certiorari on these issues.]

On the other hand, in order for an individual to secure a waiver of deportation to maintain permanent residence status that individual must meet the legal requirements of **§212(c)** as interpreted by case law. Pursuant to the **Immigration Act of**

1990, §212(c) provides:

[The Court cites verbatim 8 U.S.C. §1182(c) as set forth in this Appendix at App. 24]

The current regulations at 8 C.F.R. 212.3(d) establish the jurisdictional authority of the Immigration Judge to consider such a remedy application.

On its face, the provisions of 212(c) of the INA apply to resident aliens returning to the United States. However, in Francis v. I.N.S., 532 F.2d 268 (2nd Cir. 1976), the Court of Appeals extended the availability of 212(c) relief to aliens who had not actually departed the United States. Subsequently, the Board of Immigration Appeals (hereinafter "BIA"), adopted the reasoning of Francis and has extended §212(c) relief to aliens who are in deportation proceedings notwithstanding the fact that the alien has not proceeded abroad subsequent to admission for lawful permanent residence. See Matter of Silva, 16 I & N Dec. 26 (BIA 1976); Matter of Grandos, 16 I & N Dec. 726, 728 (BIA 1979). The BIA has also held that the seven (7) years of lawful domicile as referenced under the provisions of §212(c) requires that the individual be a lawful permanent resident alien for those seven (7) years before eligibility for the waiver can be

established. See **Chiravacharadhikul v. I.N.S., 645 F.2d 248 (4th Cir. 1981); Matter of Cerna, Int. Dec. 3161 (BIA 1991); Matter of Newton, 17 I & N Dec. 133 (1979): Matter of Anwo, 16 I & N Dec. (1977), aff'd. on other grounds, Anwo v. I.N.S. 607 F.2d 435 (D.C. Cir. 1979); Matter of S, 5 I & N Dec. 116 (1953).**

The respondent has filed this application for relief from deportation although the Court had pretermitted any hearing on the application denying the application as a matter of law on the grounds that respondent is not a lawful permanent resident of seven (7) years. [See transcript of proceedings.]

[The remaining portion of the Court's review of the law of voluntary departure has been omitted since it is not relevant to the issue raised in this petition.]

FINDINGS OF THE COURT

Initially, the Court notes that the respondent has withdrawn his applications of asylum and witholding of deportation and they have been denied for lack of prosecution. Next, the Court has found on the record that the respondent is not entitled to a waiver of his deportation under **212(c) of the INA** in that his adjustment of status occurred on November 20,

1990. As a matter of record, the Court has found that the respondent is not a permanent resident for a period of seven (7) years as is required under the **Chiravacharadhikul** case of the Fourth Circuit Court of Appeals as the BIA precedent in such cases as **Matter of Cerna**, **Matter of Newton**, and **Matter of Anwo**. The Court has rejected the respondent's legal argument as represented in his brief to the Court dated November 25, 1991, and has further specifically noted on the record that this Court lacks authority to address any and all constitutional issues which may be raised. See **Matter of Awadh**, **15 I & N Dec. 775 (BIA 1976)**; **Matter of Bulos**, **15 I & N Dec. 645 (BIA 1976)**; **Matter of Chery and Hasan**, **15 I & N Dec. 380 (BIA 1975)**.

[The remaining portion of the Court's findings are omitted as they address issues not raised in this petition.]

February 11, 1992

/s/
John F. Gossart, Jr.
U.S. Immigration Judge
Baltimore, Maryland

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A29 625 000 - Baltimore

In re: HENRY CHIMEZIE OKPALA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thanos Kanellakos, Esq.
3224 Eastern Avenue
Baltimore, Md. 21224

ON BEHALF OF SERVICE: Lawrence O. Berman
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I & N Act [8 U.S.C. § 1251 (a)(2)(A)(ii)] -
Crimes involving moral turpitude

APPLICATION: Waiver of deportation; waiver of inadmissibility; adjustment of status; voluntary departure.

This is an appeal by the respondent from the February 11, 1992, decision of an immigration judge finding him deportable as charged, denying his applications for relief from deportation under section 212(c) of the Act, 8 U.S.C. §1182(c),

for adjustment of status pursuant to section 245(a) of the Act, 8 U.S.C. §1255, for a waiver of excludability under section 212(h) of the Act, 8 U.S.C. §1182(h), and voluntary departure under section 244(e) of the Act, 8 U.S.C. §1254(e), and ordering his deportation to Nigeria. The decision of the immigration judge will be affirmed and the appeal dismissed. The request for oral argument is denied in the exercise of discretion. See 8 C.F.R. §3.1(e)

[The following portions of the BIA opinion, which addressed the issues of adjustment of status and 212(h) waiver are omitted, since they are not relevant to the issue raised in this petition.]

Finally, the respondent argues that this Board should abandon its interpretation of the "unrelinquished domicile of seven years" requirement of section 212(c) of the Act in favor of that interpretation set forth by the Circuit Court of Appeals for the Second Circuit in Lok v. INS, 548 F.2d 37 (2d Cir. 1977). We decline to revisit this issue here. We have previously held that outside of the jurisdiction of the Second Circuit we shall apply our holding that the lawful domicile of a respondent for purposes of section 212(c) of the Act begins only when that

respondent is admitted for lawful permanent residence under the Act. Matter of Newton, 17 I & N Dec. 133 (BIA 1979); Matter of Anwo, 16 I & N Dec. 293 (BIA 1977), aff.d on other grounds, 607 F.2d 435 (D.C. Cir. 1979); Matter of S-, 5 I & N Dec. 116 (1953). We are unpersuaded by the respondent's arguments that we should revise our holding on this issue. Moreover, this interpretation of the Act has also been adopted by the United States Court of Appeals for the Fourth Circuit, in which this case arises. Chiravacharadhikul v. I.N.S., 645 F.2d 248 (4th Cir. 1981), cert. denied 454 U.S. 893 (1981); see also Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979). Therefore, we are bound by that court's ruling in this case, and cannot find the respondent eligible for section 212(c) relief.

Accordingly, the following order shall be entered.

ORDER: the appeal is dismissed.

FOR THE BOARD

/s/
Mary Maguire Dunne

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

HENRY CHIMEZIE OKPALA,

Petitioner,

v. No. 92-1963

U.S. IMMIGRATION & NATURALIZATION SERVICE,

Respondent

On Petition for Review of an Order of the Immigration and Naturalization Service (A29-625-000)

Submitted: August 5, 1993

Decided: September 13, 1993

Before HALL, WILKINSON, and WILLIAMS, Circuit Judges

Petition denied by unpublished per curiam opinion

COUNSEL

Thanos Kanellakos, Baltimore, Maryland, for Petitioner. Stuart M. Gerson, Assistant Attorney General, Alice M. King, Acting Assistant Director, Norah Ascoli Schwarz, UNITED STATES

DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Henry Okpala petitions for review of a decision of the Board of Immigration Appeals ("the Board") denying his application for an adjustment of status to lawful permanent residency under 8 U.S.C.A. §1255(a) (West Supp. 1993), a discretionary waiver of inadmissibility under 8 U.S.C.A. §1182(h) (West Supp. 1993), and a waiver of deportability under 8 U.S.C.A. §1182(c) (West Supp. 1993). Because we find no abuse of discretion in the Board's decision to deny a waiver of inadmissibility and an adjustment of status, and find that Okpala was ineligible for a waiver of exclusion, we deny Okpala's petition.

Okpala, a native and citizen of Nigeria, has lived in the United States periodically since he first entered in 1982. In 1988, he obtained conditional lawful permanent residence status when he married an American citizen. After serving twenty-

seven months in prison for crimes committed in 1989 and 1990, Okpala conceded deportability as an alien convicted of two crimes involving moral turpitude not arising out of a single criminal scheme.

In support of his applications for waiver or change in status, Okpala introduced evidence that he is employed part-time and helps support his family, including his wife's teenage son. His family's possible move to Nigeria in the event of Okpala's deportation would expose them to an unfamiliar life in a foreign land, and would result in a lower standard of medical treatment for Mrs. Okpala's son, who suffers from asthma. The immigration judge denied Okpala's applications, and the Board dismissed Okpala's appeal.

Adjustment of Status and Waiver of Inadmissibility

Okpala contends that the Board abused its discretion by failing to adjust his status to that of a lawful permanent resident, pursuant to 8 U.S.C.A. §1255(a). Section 1255(a) authorizes the Attorney General to grant an alien lawful permanent resident status if (1) he was admitted or paroled into the United States; (2) he applies for adjustment of his status; (3) he is eligible for an immigrant visa and is admissible into the United States for

permanent residence; and (4) at the time he applies, an immigrant visa is immediately available to him. Decisions regarding adjustment of status are vested in the discretionary authority of the Board, which may deny relief even if the objective requirements of the statute are met. *See* 8 U.S.C.A. §1255(a); *Ka Fung Chan v. INS*, 634 F.2d 248, 253 n.7 (5th Cir. 1981).

Okpala does not qualify for an adjustment of his status, because as an alien convicted of two crimes of moral turpitude, he is ineligible for a visa and is excludable from admission into the United States. 8 U.S.C.A. §1182(a)(2)(a)(i)(I). Nevertheless, Okpala argues that the Attorney General should have waived his ineligibility pursuant to 8 U.S.C.A. §1182(h).

Section 1182(h)(1)(B) gives the Board of Immigration Appeals discretion to waive inadmissibility of a deportable alien if the alien's exclusion would result in "extreme hardship" to the alien's United States citizen or permanent resident spouse, parent or child. Okpala has no parents or children[1] who are United States citizen or permanent residents. Thus, to qualify for a waiver, he must show that his exclusion would result in extreme

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[1] Okpala acknowledges that the statute does not authorize consideration of hardship to his stepson.

hardship to his American wife.

No precise test exists for determining whether extreme hardship exits under §1182(h). The applicant bears the burden of proving extreme hardship; the Board then must assess the application by reviewing all claims in the context of the relevant facts. *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Matter of Ngai*, 19 I. & N. Dec. 245-47 (Comm'r 1984). On appeal, this Court "may review the denial of an extreme hardship finding 'procedurally' to ensure that the alien has received full and fair consideration of all circumstances that occasion the claim, . . and may find an abuse of discretion if the board utterly failed or refused to consider relevant hardship factors." *Osuchukwu v. INS*, 744 F.2d 1136, 1141 (5th Cir. 1984) (footnote omitted); *accord Hassan*, 927 F.2d at 468. *Cf. Parcham v. INS*, 769 F.2d 1001, 1005 n.3 (4th Cir. 1985).

In light of the evidence that the Okpalas have experienced marital problems and have spent half their married lives either voluntarily separated or separated due to Okpala's incarceration, and the evidence of Mrs. Okpala's financial independence from her husband, we find that the Board did not exceed its discretion by concluding that Okpala failed to show

extreme hardship to his wife if he was deported. Even if Okpala qualified for an exemption under §1182(h), the Board did not exceed its discretion by denying an exemption. In its decision to deny relief, the Board considered numerous factors including Okpala's educational achievements, criminal history, employment status, and the possible impact on Okpala's family, such as the hardship Mrs. Okpala would experience from a move to Nigeria due to the resulting poorer medical treatment for her asthmatic son. Okpala failed to show that the Board failed to consider any improper factor, or that the decision of the Board was not supported by the evidence. *See* 8 U.S.C.A. §1105a(a)(4) (1988); *Jen Hung Ng v. INS*, 804 F.2d 534, 538-39 (9th Cir. 1986).

Precondition for Waiver of Deportation

Okpala also argues that the Board and the immigration judge erred in failing to consider him for a discretionary waiver of deportation under 8 U.S.C.A. §1182(c). As a prerequisite to relief under this statute is "lawful unrelinquished domicile [in the United States] of seven consecutive years." *Id.* In *Chiravacharadhikul v. I.N.S.*, 645 F.2d 248 (4th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981), this Court interpreted

§1182(c) as requiring, as a precondition for relief, seven consecutive years of residence in the United States as a lawful permanent resident. *Id.* at 250; *see also Borokinni v. INS*, 974 F.2d 442, 446 (4th Cir. 1992). Because Okpala did not obtain lawful permanent residence status until after 1988, he does not qualify for a discretionary waiver under *Chiravacharadhikul*.[2]

For these reasons, we deny Okpala's petition. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

PETITION DENIED

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[2] Okpala urges this Court to reconsider its holding in *Chiravacharadhikul*, asserting that the contrary view expressed in *Lok v. INS*, 548 F.2d 37 (2nd Cir. 1977), is more consistent with the plain meaning of the statute and congressional intent. Okpala does not argue that anything has occurred since the Court's decision in *Chiravacharadhikul* that might provide reason to revisit the issues addressed there.

8 U.S.C. §1182(c).

§1182. Excludable aliens

* * *

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

* * *